

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, *et al.*,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Defendants.

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Case No. 3:15-cv-00059-DLH-ARS

**DEFENDANTS' MOTION FOR CLARIFICATION REGARDING
THE SCOPE OF THE COURT'S PRELIMINARY INJUNCTION**

Defendants the United States Environmental Protection Agency and the Department of the Army (collectively, "the Agencies") hereby seek clarification of the Court's May 14, 2019 Order in which the Court dismissed the State of Colorado, New Mexico State Engineer, and New Mexico Environment Department as plaintiffs to this action. ECF No. 280. The Court further ordered that the preliminary injunction entered by the Court would be lifted as to the parties being dismissed, but that "[t]he preliminary injunction remains in effect as to Intervenor-Plaintiff Coalition of Arizona/New Mexico Counties for Stable Economic Growth." *Id.* at 2. While the Order has no impact on the State of Arizona, which is already covered by the Court's 2015 preliminary injunction, the Agencies seek clarification of the applicability of the Court's 2015 preliminary injunction with respect to the ten counties in New Mexico that are part of the Coalition of Arizona/New Mexico Counties for Stable Economic Growth ("AZ/NM Counties").

The basis for the Agencies request for clarification is as follows:

1. This case involves challenges to a regulation promulgated by the Agencies in 2015 that revised the definition of "waters of the United States" under the Clean Water Act.

Before the date the regulation was to take effect, this Court preliminarily enjoined the regulation in the States of Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. ECF Nos. 70 (Order granting preliminary injunction), 79 (limiting the scope of the preliminary injunction to those State Plaintiffs). In granting the motion for preliminary injunction in August 2015, the Court found that the 2015 regulation would result in an increase in control over the States' "traditional and primary power over land and water use." ECF No. 70 at 16 (citing *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (internal quotations omitted)). The Court further found that the State Plaintiffs had established irreparable harm in the form of monetary losses that could not be recouped. ECF No. 70 at 16-17.

2. Upon the motion of Plaintiff-Intervenor the State of Iowa, ECF No. 247, the Court later enlarged the scope of the preliminary injunction to include Iowa. ECF No. 250.

3. The AZ/NM Counties moved to intervene as Plaintiffs on April 16, 2019. ECF No. 267.

4. The AZ/NM Counties were granted intervention on May 14, 2019. ECF No. 268. Although the AZ/NM Counties stated in support of their motion that they wished to intervene in part "to ensure that . . . [the 2015 regulation] remain[] preliminarily . . . enjoined in the State of New Mexico," ECF No. 269 at 1, they have not moved for a motion for preliminary injunction, or otherwise argued that they meet the standard for a preliminary injunction. *See* Fed. R. Civ. P. 7(b)(1) ("A request for a court order must be made by motion."); *id.* 7(b)(1)(B) (requiring that any motion "state with particularity the grounds for seeking the order"); *McKinney ex rel.*

N.L.R.B. v. Southern Bakeries, 786 F.3d 1119, 1122 (8th Cir. 2015) (setting forth four-factor inquiry in determining whether or not a preliminary injunction should issue).

5. The same day the Court granted the motion to intervene by the AZ/NM Counties, the Court also issued an Order dismissing as Plaintiffs the State of Colorado, New Mexico State Engineer, and New Mexico Environment Department. ECF No. 280. In that Order, the Court further stated that the preliminary injunction in this case would be lifted as to the State of Colorado and the New Mexico State Engineer and New Mexico Environment Department, but that the preliminary injunction would remain in effect as to the AZ/NM Counties. *Id.* at 2.

6. Because Plaintiff-Intervenor AZ/NM Counties have not moved for a preliminary injunction, and this Court has not made any findings as to whether the AZ/NM Counties have met the standard for such relief, the Agencies submit that the portion of the Order extending the injunction to the ten counties in New Mexico was premature. Nor have the counties advised the Court of the authority they have to seek injunctive relief where the State regulatory entities have withdrawn from the case. The Agencies thus seek clarification of the applicability of the Court's 2015 preliminary injunction with respect to the ten counties in New Mexico that are part of the Coalition of AZ/NM Counties.

Dated: May 24, 2019

Respectfully submitted,

/s/ Martha C. Mann
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